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ABSTRACT

This policy interpretation encourages institutions of higher education to continue and expand voluntary affirmative action programs to increase their enrollment of minority groups members and to attain a diverse student body. It identifies permissible techniques to achieve these objectives consistent with Title VI of the Civil Rights Act of 1964 and the Supreme Court's decision in Regents of the University of California v. Bakke. (Author)

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

/45 CFR Part 807

Policy Interpretation

INTRODUCTION

The following policy interpretation is issued by the Office for Civil Rights under the procedures announced in the FEDERAL REGISTER on May 1, 1978, 43 FR 18630. It interprets the Department's regulation issued under Title VI of the Civil Rights Act of 1964.

Title VI of the Civil Rights Act of 1964

Policy Interpretation Number 1

SUBJECT: Voluntary Affirmative Action: Admission of Minority Students to Institutions of Higher Education.

PURPOSE: This policy interpretation encourages institutions of higher education to continue and expand voluntary affirmative action programs to increase their enrollment of minority group members and to attain a diverse student body. It identifies permissible techniques to achieve these objectives consistent with Title VI of the Civil Rights Act of 1964 and the Supreme Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265(1978)(Bakke).

SUMMARY OF POLICY INTERPRETATION: An institution of higher education that receives Federal financial assistance is encouraged to take voluntary affirmative action in admissions to overcome the effects of conditions that have resulted in limited participation by minority group members and to attain a diverse student body. The Department has reviewed the Supreme Court's decision in Bakke and has determined that voluntary affirmative action may include, but is not limited to, the following: consideration of race, color, or national origin among the factors evaluated in selecting students; increased recruitment in minority institutions and communities; use of alternative admissions criteria when traditional

criteria are found to be inadequately predictive of minority student success; provision of preadmission compensatory and tutorial programs; and the establishment and pursuit of numerical goals to achieve the racial and ethnic composition of the student body the institution seeks.

Techniques of this kind are permissible regardless of whether there has been a finding of past discrimination. Where such a finding has been made, an institution has a duty to overcome the effects of past discrimination and, therefore, may be required to employ these as well as other race conscious techniques to overcome the present effects of past discrimination. These additional techniques also may be employed by colleges and universities to overcome the effects of discrimination found to have been committed by related institutions. However, in light of Bakke, in the absence of a finding of past discrimination committed by the institution or related entities, a fixed number of positions may not be set aside for minority students for which nonminority students cannot compete, nor may race or national origin otherwise be used as the sole criterion for admissions.

POLICY INTERPRETATION: Title VI of the Civil Rights Act of 1964 prohibits institutions of higher education that receive or benefit from Federal financial assistance from discriminating against applicants for admission on the basis of race, color, or national origin. The primary purpose of the statute was to eliminate widespread discrimination against blacks and other minorities in federally-assisted programs. Accordingly, the Department's Title VI regulation requires recipients of Federal financial assistance, when found to be discriminating, to end any current discrimination and to take affirmative action to overcome the effects of past discrimination.

Findings of discrimination can be made by a legislative, judicial or administrative body, including the Office for Civil Rights. The regulation also permits a recipient to take affirmative action to overcome the effects of conditions that have resulted in limited participation by persons of a particular race, color, or national origin and to attain a diverse student body. This is permitted even though the recipient has not itself discriminated against these groups.

The Department has reviewed its Title VI regulation, in light of the Supreme Court's decision in Bakke, and has concluded that no changes in the regulation are required or desirable. The Court affirmed the legality of voluntary affirmative action. However, where there has been no

finding of past discrimination, Bakke prohibits an institution from setting aside a fixed number of places for minority students for which nonminorities cannot compete, or otherwise using race as the sole criterion for admission.

The limitations contained in Bakke apply only to institutions undertaking voluntary affirmative action. The decision has no bearing on the legal obligation of an institution which has been found, by a court, legislature or administrative agency, to have discriminated on the basis of race, color, or national origin. Race conscious procedures that are impermissible in voluntary affirmative action programs may be required to correct specific acts of past discrimination committed by an institution or other entity to which the institution is directly related. For example, newly established public institutions of higher education in a State that formerly maintained segregated colleges may be required to participate in a desegregation plan to provide a complete remedy for past discrimination.

The Department encourages the continuation and expansion of voluntary affirmative action programs. This policy interpretation provides guidance to institutions of higher education that are not responding to a finding of past discrimination as to permissible means of increasing minority student enrollments under the Department's

Title VI regulation. One illustration of permissible voluntary action is stated in the regulation:

> Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

Other methods of considering race, color, or national origin in voluntary affirmative action programs, consistent with Bakke and the Department's regulation, include but are not limited to the following:

An institution may:

1) Consider race, color, or national origin as a positive factor, with other factors, such as geographic or economic

circumstance, in selecting from among qualified candidates. The relative weight granted to each factor is properly determined by institution officials; race, color or national origin may be accorded greater weight than other factors;

2) Recruit, or increase recruiting, in predominantly minority institutions and communities;

3) Modify admissions criteria for minorities if it determines that it is necessary for a fair appraisal of the academic promise of minority applicants. This may be appropriate to cure established inaccuracies in predicting performance where an institution can demonstrate that traditional admissions criteria are not predictive of success for minority students;

4) Offer special services, including summer institutes and special tutoring services, to assist educationally and socially disadvantaged students in meeting admissions requirements. Students may not be excluded from these programs on the basis of race, but race may be considered as a factor in selecting participants; and

5) Establish and pursue numerical goals to achieve the racial and ethnic composition of the student body it seeks through techniques such as those listed above.

In addition to the foregoing techniques, institutions may use their authority to broaden admissions criteria generally to evaluate better the qualifications of minority applicants. This may be accomplished by giving increased consideration to an applicant's character, motivation, ability to overcome economic and educational disadvantage, work experience, and other factors.

All of these techniques are consistent with Title VI because they do not exclude individuals on the basis of race, color, or national origin from competing for any place in an institution of higher education. The Department encourages the development of additional or alternative techniques for inclusion in voluntary affirmative action plans.

AUTHORITY: Regulation issued under Title VI of the Civil Rights Act of 1964, 45 C.F.R.:

Section 80.3(b)(6)

(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

Section 80.5(j)

Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not, in fact, be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its programs better known and more readily available to such group, and take other steps to provide that group with more adequate service.

COVERAGE: This policy interpretation applies to any public or private institution of higher education that receives or benefits from financial assistance authorized or extended under a law administered by the Department. Coverage includes institutions whose students participate in HEW funded or guaranteed student loan assistance programs. For further information, see definition of recipient at 45 C.F.R. 80.13(i) and (j).

Date: October 2, 1979

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Director
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